

JAMES KEE

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

BURCHICK CONSTRUCTION COMPANY,)
INC.,)

Plaintiff,)

vs.)

HBE CORPORATION,)

Defendant.)

Civil Docket No.
05-CV-12E

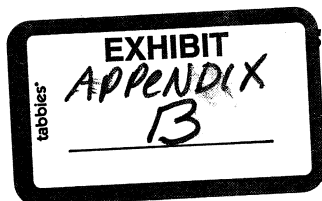
Deposition of JAMES KEE
(Thursday, September 22, 2005)

Filed on behalf of Plaintiff
BURCHICK CONSTRUCTION COMPANY, INC.

Counsel of Record for this Party:
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DEPOSITION OF JAMES KEE,

taken pursuant to the Federal Rules of Civil
Procedure, by and before Sheila A. Rivers, a
Registered Professional Reporter and a Notary
Public in and for the Commonwealth of
Pennsylvania, at the offices of Reed Smith, LLP,
435 Sixth Avenue, Pittsburgh, Pennsylvania 15219,
on Thursday, September 22, 2005, commencing at
9:00 o'clock a.m.

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COUNSEL PRESENT:

For the Plaintiff:

Kurt F. Fernsler, Esquire
Reed Smith, LLP
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219

For the Defendant:

Michael D. Glass, Esquire
Polito & Smock, P.C.
Suite 400, Four Gateway Center
444 Liberty Avenue
Pittsburgh, Pennsylvania 15222-1207

Also Present:

David Meuschke

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1 Clark over that 23-year period? I'm just trying
2 to get an idea of what your experience is in the
3 industry.

4 A. Oh, everything from system project
5 manager, project manager, senior project manager,
6 project exec. I grew in that organization very
7 quickly. I had a two-year hiatus amongst that
8 where I worked for another company as
9 construction executive.

10 Q. What company was that?

11 A. Gilbane.

12 Q. Now, HBE, I don't know a lot about HBE
13 other than what I can read on their web site.
14 What does HBE do?

15 A. HBE is a design builder of hospital and
16 financial facilities. We're fully integrated,
17 all our design is done in-house, and our core
18 products are just those, we do really nothing
19 else.

20 Q. So, I assume you have a relatively large
21 design professional staff.

22 A. That's correct.

23 Q. Do you know how many design professionals
24 you have?

25 A. Oh, I'd say there's probably 200, 250,

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1 somewhere in that range. I'm not positive, but
2 it's in that order of magnitude.

3 Q. How big is HBE in terms of revenues, do
4 you know?

5 A. Yes. Last year, we put in place, our
6 revenue was 143 million.

7 Q. Now, on the project, the hospital and
8 behavioral health facility, did HBE occupy its
9 normal role, i.e., did it perform designing?

10 A. That's correct.

11 Q. It did all the design?

12 A. Yes.

13 Q. Were there any design professionals
14 involved in the project on site or approving
15 payments, things of that nature, that were not
16 HBE folks? Do you know?

17 A. No. Our relationship was with the
18 client, and the communication on payment, the
19 requisitions were directly with the client.

20 Q. I'm not sure I understand your answer.
21 Let me ask --

22 A. There was no construction manager that
23 was involved, if that's where you're going with
24 that. It was directly with UPMC.

25 Q. Well, I guess my question is, there were

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1 design professionals, obviously, involved in a
2 job of this magnitude.

3 A. Um-hmm.

4 Q. And the design professionals involved
5 were employees of HBE --

6 A. That's correct.

7 Q. -- correct?

8 You're not aware of any design
9 professionals involved in the project who were
10 not employees of HBE; is that right?

11 A. No, I'm not.

12 Q. We'll be talking a little bit here about
13 the subcontracts between Burchick Construction
14 and HBE for the project, and of course, there's a
15 separate written contract for each of the main
16 hospital buildings, behavioral health buildings.
17 I'm going to show you copies of some of them just
18 so we're going to be talking about them and we
19 can agree what we're talking about.

20 MR. FERNSLER: Sheila, if you could
21 mark this one for me.

22 (Kee Deposition Exhibit No. 2
23 was marked for identification.)

24 BY MR. FERNSLER:

25 Q. And I've handed the witness a document

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1 that's now been marked as Exhibit 2, and it bears
2 Bates Nos. D-53 through D-85.

3 Mr. Kee, take a moment to look at this,
4 if you would.

5 A. (Reviewing document.)

6 Q. I wanted to ask you a couple things.
7 First of all, this package of documents was
8 produced to me in this order from HBE. And the
9 contract itself, the subcontract itself, between
10 Burchick and HBE, I believe, is found between
11 pages D-53 and D-61. Does that sound right?

12 A. Appears to be correct.

13 Q. Okay. Now, attached, pages following
14 D-61, are a number of other documents that are
15 not necessarily part of the contract, but
16 required by the contract, a copy of a performance
17 bond and some other information that I understand
18 were maintained by HBE in its project files.

19 Before coming here today, were you
20 familiar with the subcontract on the main
21 hospital building between HBE and Burchick?

22 A. I have reviewed it, I have some
23 familiarity with it.

24 Q. Does this appear to be that contract?

25 A. Yes, it does.

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1 Q. Now, the contract on the first page also
2 makes reference to some drawings and
3 specifications. Do you see that?

4 A. Yes.

5 Q. Okay. Now, just for the sake of
6 completeness here, I've got what I believe to be
7 those specifications.

8 MR. FERNSLER: We're going to mark
9 these as Exhibit 3.

10 (Kee Deposition Exhibit No. 3
11 was marked for identification.)

12 BY MR. FERNSLER:

13 Q. Take a minute to review Exhibit 3, if you
14 would, Mr. Kee. Exhibit 3 is entitled, UPMC
15 Northwest Cranberry Township, Venango County,
16 Pennsylvania, Concrete And Foundations Package.

17 A. Okay.

18 Q. Do these appear to be the specifications
19 as referenced in the subcontract, Exhibit 2?

20 A. Appear to have similarity to it, yes.

21 Q. Do you know if they're just similar or if
22 these are, in fact, the specifications?

23 A. Without doing a page per page
24 cross-reference, I couldn't ascertain that.

25 MR. FERNSLER: We'll get some of

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1 this housekeeping out of the way. I'm going to
2 also give you now the subcontract between HBE and
3 Burchick on the behavioral health facility.

4 (Kee Deposition Exhibit No. 4
5 was marked for identification.)

6 BY MR. FERNSLER:

7 Q. And the witness has been handed what's
8 been marked as Exhibit 4, which is the
9 subcontract between HBE and Burchick, dated
10 August 16, 2002. The project is listed as UPMC
11 Northwest Behavioral Health Facility, Oil City,
12 PA.

13 Mr. Kee, does that appear to be a copy of
14 the subcontract between Burchick and HBE for the
15 behavioral health facility?

16 A. Yes, it does.

17 Q. I want to just understand -- I already
18 asked most of my questions on this, I want to
19 just understand the hierarchy within HBE specific
20 to this project.

21 A. Okay.

22 Q. You were the VP of operations, eastern
23 division, between July of 2003 and, I assume,
24 when the project was completed.

25 A. No. I had actually moved into the role

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1 involved with Mr. Alderman and his staff to
2 prepare those payment applications?

3 A. My understanding is that that included
4 John Williams, who was the project manager for
5 them, and George Ehringir, who is the senior
6 project manager for them.

7 Q. What was Mr. Gemme's involvement, if any,
8 in preparing the pay aps from HBE to UPMC?

9 A. I would say his involvement would be more
10 peripheral.

11 Q. Well, is it correct to say, then, if Mr.
12 Alderman and his staff worked with John Williams,
13 George Ehringir and their staff, they put
14 together a payment ap that they thought was
15 correct and it was subsequently signed off on by
16 HBE's architect, that that was all that was
17 necessary then for UPMC to pay HBE?

18 A. That's my understanding.

19 Q. Okay. And the payments from UPMC to HBE,
20 were they monthly?

21 A. Yes.

22 Q. And they were on a percent complete, as
23 you mentioned, right?

24 A. Yes.

25 Q. All right. How big was the contract

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1 between HBE and UPMC for the hospital project?

2 A. It rounded -- it ended up approximately
3 \$54 million for both jobs.

4 Q. So, is it a fair characterization to say
5 that this is a very large contract for HBE?

6 A. Yes, it is.

7 Q. Have you ever worked on one bigger?

8 A. Me personally?

9 Q. While you've been at HBE.

10 A. No.

11 Q. Okay. Do you know what the contractual
12 arrangement is between UPMC and HBE with respect
13 to retainage under either the contract with the
14 hospital or the behavioral health facility?

15 A. My understanding, and I'd have to review
16 the contract to verify that, but I believe they
17 were holding ten percent retainage and, I
18 believe, up to a point of 50 percent completion,
19 and then on a sliding scale, we'd hold no more
20 retainage until we reached five percent. I
21 believe that is the arrangement.

22 Q. And what would happen when you reached
23 five percent?

24 A. That would be at the end of the job. And
25 then the owner would reduce retainage based on

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1 was --

2 A. Generated.

3 Q. -- generated?

4 A. No.

5 Q. Do you know in November of 2004, if, in
6 fact, UPMC was actually holding \$250,000 in
7 retainage?

8 A. Only what I see based on this document.

9 Q. Okay. Do you happen to know now, here in
10 September of '05, how much money UPMC is holding
11 in retainage, if any?

12 A. Yes. (Reviewing document.)
13 \$159,000.

14 Q. 159,000 even?

15 A. Correct. That's on the main hospital.

16 Q. The hospital?

17 A. Yeah.

18 Q. How do you know that? Where did you get
19 that figure?

20 A. Looking at a detail accounts receivable
21 detail.

22 Q. And do you know if that document was
23 produced to Burchick in this litigation?

24 MR. GLASS: I can answer that it was
25 not. It was just generated yesterday.

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1 them that required final payment.

2 Q. So, notwithstanding the fact that HBE
3 hasn't received final payment from UPMC, HBE has
4 paid certain subs everything?

5 A. At our discretion, yes.

6 Q. I'm going to show you another document
7 here.

8 MR. FERNSLER: Let's go off the
9 record for a minute.

10 (Discussion off the record.)

11 (Recess.)

12 MR. FERNSLER: Sheila, could you
13 mark that.

14 (Kee Deposition Exhibit No. 7
15 was marked for identification.)

16 BY MR. FERNSLER:

17 Q. I'm showing the witness what's been
18 marked as Exhibit 7, application for payment No.
19 18 from HBE to UPMC, dated July 17, 2003.

20 Mr. Kee, take a look at this document,
21 let me know when you're done, please.

22 A. (Reviewing document.)

23 Okay. Yes.

24 Q. On the third page of Exhibit 7, there's
25 descriptions of work, and we've already talked

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1 about these descriptions in an earlier exhibit.

2 A. Yes.

3 Q. And concrete forms, building concrete,
4 concrete finishes and rebar and mesh, items 60,
5 70, 72 and 75, I think you would agree with me
6 represent Burchick's scope of work.

7 A. Yes.

8 Q. And when payment application 18, covering
9 the period from June 1, 2003 to June 30, 2003,
10 was submitted by HBE, it indicates that
11 Burchick's work is 100 percent complete. Would
12 you agree with that?

13 A. Yes.

14 Q. And under the retainage column, it
15 indicates zero for Burchick's work at that time;
16 is that right?

17 A. That's what that form indicates.

18 Q. Okay. Would you agree with me that HBE
19 has been paid 100 percent for Burchick's work on
20 the hospital contract?

21 A. Less retainage applied. As you'll
22 notice, just so we clear the record, every one of
23 these shows retainage as a gross number at the
24 bottom, and this is a great example, as we have a
25 number of incomplete items where there's zero

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1 I don't know what -- I mean, he, obviously, had
2 written a note on here about holding relative to
3 reduction of retainage from the owner.

4 Q. Well, if HBE had concerns about allegedly
5 deficient work of Burchick at this time, did they
6 give them notice of that?

7 A. I don't know. I don't know what notice
8 was given. I know notice was given when
9 subsequent stages of work was to proceed that
10 required that their work was in conformance with
11 the specifications.

12 Q. Do you know when that was?

13 A. Well, yes. There are a series of letters
14 that were generated over a period of time
15 requesting Burchick to perform corrective work.

16 Q. And I have some of those. We'll talk
17 about those.

18 A. Sure.

19 Q. But I think those are generally -- I
20 think they --

21 A. Late '03.

22 Q. Early winter of '04.

23 A. 12/03, I think, is the first one.

24 Q. At any rate, a number of months after
25 Burchick's payment application in Exhibit 9,

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1 right?

2 A. (Nodding head up and down.)

3 Q. I'm going to show you another document.

4 (Kee Deposition Exhibit No. 11
5 was marked for identification.)

6 BY MR. FERNSLER:

7 Q. The witness has been handed Exhibit 11,
8 payment application for Burchick to HBE, dated
9 October 23, 2003. It's application 8. And this
10 one is on the behavioral health project.

11 I think you'd agree with me that in this
12 payment application, Burchick is asking to be
13 paid 100 percent of the contract balance. Would
14 you agree?

15 A. Appears so, yes.

16 Q. And this was approved by HBE on
17 November 3, 2003, correct, signed by Jon
18 Alderman?

19 A. Correct.

20 Q. Is that your superintendent?

21 A. Actually had a note here of holding
22 retention.

23 Q. But he agrees -- well, I guess I'm trying
24 to understand what his signature represents.
25 Does it represent that all the work is done and